PRIVY COUNCIL REPORTS

GOH ENG WAH v. YAP PHOOI YIN & ANOR.

[P.C. (Lord Scarman, Lord Elwyn-Jones, Lord Roskill, Lord Brandon of Oakbrook and Lord Templeman) January 24, 28 & February 25, 1985]
[Privy Council Appeal No. 6 of 1983]

Landlord and Tenant – Lease – Construction of – Rent payable.

In this case the landlord, the registered proprietor of the land executed a lease of the land to the tenant. The lease recited that the registered proprietor of the land leased the land and demised the "said land together with the buildings erected thereon and known as Star Theatre for a term of thirty years at a monthly rental as stated thereafter." Clause 1 provided that the rent of the said land shall be as follows:–
(iv) From the beginning of the 21st year to the end of the 25th year such sum exceeding $700/– as shall be agreed to by the parties hereto or as shall be fixed by arbitration.

At the end of the twenty years the parties were unable to agree on the rent and the dispute was accordingly referred to an arbitrator who stated a case to the Court asking "Whether on an interpretation of Clause 1(iv) of the said memorandum of lease the correct base for the assessment of the fair rental payable therein should be the value of the land only or whether it should relate to the land and buildings erected thereon".

In the High Court it was held that the rent must be assessed with reference to the land only. The Federal Court allowed the landlord's appeal and held that the rent should relate to the land together with the buildings erected thereon – See [1982]1 M.L.J.151. The tenants appealed with leave of the Federal Court to the Yang di-Pertuan Agong.

Held: (1) by well established principles rent would issue out of the land including any buildings from time to time on the land and would *prima facte* be referable to the value of the land plus the buildings;

(2) in the absence of any express instructions in the lease, the lease on its true construction did not authorise any deviation from the usual rule and it followed that the rent must be fixed by reference to the land and buildings thereon.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

D. Wood Q.C. (*D. Neuberger* and *J.A. Yeo* with him) for the appellants.

C.A. Brodie Q.C. (*Wong Chong Wah* with him) for the respondent.

Cur. Adv. Vult.

Lord Templeman (delivering the Judgment of the Board): This appeal concerns an unusual rent review clause in an unusually worded lease. The question is whether the rent payable in respect of the demised premises should be based on the letting value of the site only or on the letting value of the site and the building thereon.

The lease was dated August 16, 1957 and recited that the landlord was the registered proprietor of "lot No. 573, Section 62, in the town of Kuala Lumpur, in the District of Kuala Lumpur, in area 0 acres 2 roods 27.9 poles (hereinafter referred to as 'the said land')". The recital which was no doubt adopted from the terms of the Certificate of Title did not refer to any building in the definition of "the said land". The lease then demised "the said land together with the buildings erected thereon and known as Star Theatre... for a term of thirty years from July 1, 1957 at a monthly rental as stated hereinafter, ... subject to the stipulations, modifications, terms and conditions hereinafter contained". Clause 1 of the lease provided for "the rent of the said land". By well established principles that rent would issue out of the land including any buildings from time to time on the land and would *prima facie* be referable to the value of the land plus buildings. By clauses 1(i), (ii) and (iii) the rent was fixed at $400 per month for the first ten years, $500 per month for the next five years, $700 per month for the next five years, and then:–

> "(iv) From the beginning of the 21st year to the end of the 25th year such sum exceeding $700 as shall be agreed to by the parties hereto or failing agreement as shall be fixed by an arbitrator.
>
> (v) From the beinning of the 26th year to the end of the 30th year such sum exceeding the rent fixed for the preceding period of five years as shall be agreed to by the parties hereto or failing agreement as shall be fixed by an arbitrator."

At the end of twenty years the parties were unable to agree on the rent and the dispute was accordingly referred to an arbitrator who stated a case to the Court asking:–

> "Whether on an interpretation of clause 1(iv) of the said Memorandum of Lease the correct base for assessment of the fair rental payable therein should be the value of the land only or whether it should relate to the land and buildings erected thereon."

In the High Court of Malaya at Kuala Lumpur Harun Hashim J. held that the rent "must be assessed with reference to the land only". The Federal Court of Malaysia (Raja Azlan Shah, Ag. L.P. Malaysia, Lee Hun Hoe C.J. (Borneo) and Mohamed Azmi J.) allowed the landlord's appeal and held that the rent should relate to the land together with the buildings erected thereon. The

tenants appeal with leave of the Federal Court to His Majesty the Yang di-Pertuan Agong.

Down to the end of clause 1 of the lease there are no grounds for diverging from the general rule that the rent of the land must be valued as at the end of the twentieth year of the term with the buildings then erected. On behalf of the tenants Mr. Wood has powerfully and persuasively argued that reading the lease as a whole, there is a sustained distinction between the land on the one hand and the buildings on the other hand and that it can be inferred from the lease that the rent of the land was intended to ignore the buildings.

The tenants' covenants included in clause 3(b) a covenant to keep in repair "the cinema at present known as Star Theatre and erected by the Lessee at his own cost and expense on the said land". The parties could not have intended, submits Mr. Wood, to make the tenants pay a rent for the cinema which the tenants had themselves erected. It is conceded that the rent for the first twenty years must have been a low rent beginning at 1% and not exceeding 2% of the sum of $320,000 for which the tenants covenanted in clause 3(e) to insure the cinema. The lease did not reveal whether the tenants were entitled at law to a lease at a low rent because they had erected the building by virtue of some prior agreement to that effect. Subsequent provisions of the lease maintained a distinction between the land and the buildings although not always a logical distinction. For example there was a covenant not to assign sublet or part with possession of the cinema or any part thereof whereas logically that covenant ought to refer to or include the land. Mr. Wood pointed out that there are no references to the land which also includes the cinema.

Finally Mr. Wood relied on clause 4(b) of the lease whereby the tenants were granted an option at the expiration of the term of thirty years for "a lease of the said area and the said cinema theatre and all other buildings with their fixtures and fittings for a further term of five years containing the like covenants ... with the exception of the covenant to renew and 'the conditions as to rental' which shall be fixed by mutual agreement of the parties herein or failing agreement which shall be fixed by an arbitrator but which in either case shall not exceed the amount of rental payable for the last five years of the term hereby created". Mr. Wood faintly argued that there was a distinction between the rent for the thirty year term which was to be the rent of the said land and the rent of any term granted pursuant to the option to renew which was to be of "the said area and the said cinema theatre and all other buildings...". Ultimately however Mr. Wood acknowledged the difficulty of arguing that the rent to be fixed pursuant to clause 1(iv) and (v) of the lease was to be a rent based on the land ignoring the buildings whereas the rent to be similarly fixed by the arbitrator pursuant to clause 4(b) was to be fixed by reference to the land plus the buildings.

Their Lordships do not consider that the terms of the landlord's and tenants' covenants shed any light on the problem now to be solved save that they show that the tenants had paid for the cinema and that the draftsman of the lease was well aware of that fact. In those circumstances it would not have been surprising if the lease had provided for a low rent. Indeed the lease does so provide for the first twenty years because Mr. Brodie who appeared for the landlord acknowledged that bearing in mind the insurance covenant to insure for $320,000 the rents of $400, $500 and $700 fixed by clauses 1(i), (ii) and (iii) were low rents. The lease provides for the rent to be fixed after twenty years by an arbitrator and does not tell him on what basis he is to make that valuation. In the normal course of events he would base his value on the land plus buildings. Mr. Wood's strongest point is that, having fixed a rent for the first twenty years, the lease expressly provides that the arbitrator is not to fix a rent for the next five years at $700 or less that being the low rent last paid. If, submits Mr. Wood, the intention had been to change from a low rent basis to a high rent basis there would have been no need to specify that the new rent must exceed $700.

While appreciating the force of this argument, their Lordships agree with Mr. Brodie that if the parties intended that the rent fixed by an arbitrator should ignore the buildings on the land, they should and would have given express instructions to the arbitrator for that purpose. In the absence of any such express instructions in the lease, then whatever the parties may in their heart of hearts have intended, the lease on its true construction does not authorise any deviation from the usual rule and it follows that the rent must be fixed by reference to the land and the buildings thereon. In short Mr. Wood's submissions involve an amount of speculation which cannot be justified. The lease must be construed in accordance with the intentions of the parties but only insofar as those intentions were expressed in the lease. There is nothing in the lease which enables the arbitrator

to carry out the difficult task of assuming that the rent he is to fix must be a rent which ignores the facts and compels the arbitrator to make the hypothetical assumption that no cinema was ever built.

In the result their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Masons & Herbert; Smith & Co.*

V. M. PEER MOHAMED v. GREAT EASTERN LIFE ASSURANCE CO. LTD.

[P.C. (Lord Scarman, Lord Elwyn-Jones, Lord Roskill, Lord Brandon of Oakbrook and Lord Templeman) January 22 & February 25, 1985] [Privy Council Appeal No. 15 of 1983]

Contract – Agreement under seal – Assignment of furniture and fixtures – Whether agreement sufficed to assign tenancy of premises – Control of Rent Act (Cap. 266), s. 4.

In this case the premises had been let by the respondents at some time probably before July 20, 1953, on an oral monthly tenancy to one Abdullah. The terms of the monthly tenancy did not prohibit an assignment by the tenant. The tenancy was protected under the Control of Rent Act. An agreement was made between Abdullah, as vendor, one Murugaiyan as attorney and the appellant as the purchaser. The agreement recited that the vendor was the principal tenant of the premises and that the attorney had been appointed to manage the premises. The agreement also recited that the attorney had agreed to sell to the purchaser all fixtures and furniture in the said premises and the purchaser agreed to pay the purchase price of $3,300.00. It was further agreed that the vendor shall cease to be the principal tenant of the premises. The vendor and attorney also covenanted with the purchaser that he had the power to transfer the tenancy into his name and the purchaser undertook on his own account to have the tenancy transferred into his own name. The appellant was in possession of the premises from 1953 onwards. In 1976 the respondents served in the premises notice to quit addressed to the vendor and brought proceedings for possession against the appellant on the ground that he was a trespasser. In the District Court the landlord's claim for possession was dismissed on the grounds that the appellant was the tenant of the premises and was entitled to protection under the Control of Rent Act. On appeal to the High Court the appeal was allowed and an order for possession against the appellant allowed on the ground that the agreement was merely an agreement evidencing the sale and transferring the possession of the furniture and fittings of the premises. An appeal to the Court of Appeal was dismissed – see [1982] 2 M.L.J. 298. The appellant appealed. The question which arose in the case was whether the agreement sufficed to assign the tenancy to the appellant.

Held: in the circumstances of this case, the 1953 deed effected an assignment of the tenancy to the appellant. The appeal should therefore be allowed and the order of the District Court restored.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Ronald Bernstein Q.C. (*Kirk Reynolds* with him) for the appellant.

Gerald Godfrey Q.C. (*Alan Sebestyen* with him) for the respondents.

Cur. Adv. Vult.

Lord Templeman (delivering the Judgment of the Board): This appeal, which has been well presented and argued on behalf of both protagonists, raises a short question of construction arising out of an agreement under seal dated December 9, 1953. The question is whether the agreement sufficed to assign to the appellant, Mr. V.M. Peer Mohamed, a tenancy of the premises 449 East Coast Road, Singapore.

The premises were let by the landlord respondents, the Great Eastern Life Assurance Company Limited, on an oral monthly tenancy at some time prior to December 9, 1953 and probably before July 20, 1953 to Mr. D. Abdullah. The terms of the monthy tenancy did not prohibit an assignment by the tenant. On July 20, 1953 there came into force the Control of Rent Ordinance, 1953 which with amendments is now comprised in the Control of Rent Act (Cap. 266). The 1953 Ordinance conferred security of tenure on tenants and by an express provision, now section 4 of the Act, prohibits the payment of any premium or like sum "...as a condition of the grant, renewal, transfer or continuance of a tenancy...".

The agreement under seal which falls to be construed was made therefore after it had become illegal to demand or receive a sum in consideration of the assignment of a protected tenancy. It is common ground that the tenancy of 449 East Coast Road was protected. The agreement was made between the tenant, Mr. Abdullah described as the vendor of the first part, Mr. Murugaiyan described as the attorney of the second part and the appellant described as the purchaser of the third part. The agreement recited *inter alia* that the vendor was "the principal tenant" of the premises